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GENEVA FOR USTR

E.O. 12356: DECL: OADR

TAGS: ETRD, USTR, BR

SUBJECT: AMBASSADOR CLAYTON YEUTTER'S RESPONSE TO DINGELL
/BLILEY LETTER REGARDING BRAZIL'S INFORMATICS POLICY

1. FOLLOWING IS AMBASSADOR CLAYTON YEUTTER'S RESPONSE
 TO THE LETTER RECEIVED FROM CONGRESSMEN DINGELL AND
 BLILEY OF THE HOUSE SUBCOMMITTEE ON OVERSIGHT AND
 INVESTIGATIONS REGARDING THE SECTION 301 CASE AGAINST
 BRAZIL'S INFORMATICS POLICY:

2. BEGIN TEXT: DEAR MR. CHAIRMAN/TOM:

THANK YOU FOR YOUR LETTER REGARDING THE SECTION 301
 CASE AGAINST BRAZIL'S INFORMATICS POLICY. I APPRECIATE
 THE STRONG CONCERN YOU AND YOUR COLLEAGUES ON THE
 SUBCOMMITTEE HAVE SHOWN IN THIS CASE. NEGOTIATIONS
 HAVE BEEN LONG AND DIFFICULT, AND U.S. CONGRESSIONAL
 INTEREST IS HELPFUL TO US IN PRESSING THE BRAZILIANS TO
 CHANGE THEIR RESTRICTIVE INFORMATICS POLICY.

THE BRAZIL INFORMATICS CASE IS ONE OF THE MOST COMPLICATED
 UNFAIR TRADE INVESTIGATIONS WE HAVE EVER INITIATED,
 COVERING ISSUES INVOLVING MARKET ACCESS, SERVICES,
 INVESTMENT AND INTELLECTUAL PROPERTY RIGHTS. IN
 ADDITION, BRAZIL'S PROTECTIONIST INFORMATICS POLICY
 RESULTS FROM A NUMBER OF DECREES AND NORMATIVE ACTS IMPLE-
 MENTED OVER THE LAST FIFTEEN YEARS -- AS WELL AS THE
 INFORMATICS LAW PASSED IN 1984. WE HAVE MADE HEADWAY
 ON PARTS OF THE CASE, WHICH WERE SUBSEQUENTLY SUSPENDED
 BY THE PRESIDENT, AND FALLEN SHORT ON OTHER ISSUES,
 WHICH ARE STILL UNDER NEGOTIATION. CONSEQUENTLY, IT IS
 VERY EASY TO LOSE TRACK OF WHERE WE STAND IN THE CASE
 UNLESS IT IS MONITORED CLOSELY ON A REGULAR BASIS. THE
 PRESS REPORTS FOLLOWING MAJOR DECISIONS ON THIS CASE
 CAN LEAD TO MISUNDERSTANDINGS AS A RESULT.

THEREFORE, I BELIEVE THE ANSWERS TO THE QUESTIONS YOU
 RAISED IN YOUR LETTER ARE BEST ADDRESSED IF GROUPED
 INTO THOSE ISSUES CONCERNING THE ENTIRE SECTION 301
 INVESTIGATION (QUESTIONS 1 AND 4) AND THOSE ISSUES
 REGARDING THE MOST RECENT DISPUTE OVER BRAZIL'S SOFTWARE
 LAW (QUESTIONS 2 AND 3). MY ANSWERS AND THE PRESS RELEASE
 YOU REQUESTED ARE ENCLOSED.

Rep Dingell
Rep Bliley
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YOUR LAST QUESTION REGARDING THE BRAZIL CASE AND THE CREDIBILITY OF SANCTIONS UNDER SECTION 301 IN GENERAL ASSUMES THAT NO PROGRESS HAS BEEN MADE IN OUR NEGOTIATIONS. MY ANSWERS TO YOUR QUESTIONS CLEARLY SHOW THAT THE BRAZILIANS HAVE ADDRESSED SOME OF THE MAJOR OBJECTIVES WE SOUGHT, PARTICULARLY PASSAGE OF A LAW THAT EXTENDS COPYRIGHT PROTECTION TO COMPUTER SOFTWARE. SECOND, I BELIEVE THAT THE POINT OF NEGOTIATING UNDER A 301 INVESTIGATION IS TO OPEN MARKETS AND TO CHANGE THE RESTRICTIVE PRACTICES IN QUESTION. IMPOSING SANCTIONS AUTOMATICALLY IN EVERY 301 CASE DOES NOT NECESSARILY LEAD TO THAT RESULT. INDEED, IT OFTEN SPELLS THE END OF ANY FURTHER CONCESSIONS FOR U.S. EXPORTERS AND ALSO HURTS U.S. CONSUMERS, IMPORTERS, RETAILERS AND DISTRIBUTORS WHOSE PRODUCTS ARE TARGETED IN THE RETALIATION. OBVIOUSLY, THERE ARE DIFFICULT JUDGMENTS TO BE MADE AS TO WHEN RETALIATION WILL LEAD TO FURTHER CONCESSIONS AND WHEN IT WILL SIMPLY END NEGOTIATIONS.

YOUR LETTER STATES THAT THE ADMINISTRATION "HAS NOT PENALIZED THE BRAZILIANS SO MUCH AS A NICKEL" UNDER SECTION 301. THIS VIEW IS NOT SHARED BY THE BRAZILIAN AND U.S. PRIVATE SECTOR, WHO CLAIM THAT THE DELAY IN MAKING A FINAL DECISION ON THE SANCTIONS HAS COST

BRAZIL BETWEEN 300 AND 500 MILLION DOLLARS IN EXPORT SALES. WHILE THESE ESTIMATES MAY BE HIGH, THE FEDERAL REGISTER NOTICE PUBLISHED LAST NOVEMBER CREATED CONSIDERABLE UNCERTAINTY AMONG BRAZILIAN EXPORTERS. THOSE BRAZILIAN EXPORTERS WHO COULD POTENTIALLY BE AFFECTED BY SANCTIONS RESPONDED TO THE PRESIDENT'S ANNOUNCEMENT AS IF SANCTIONS HAD ALREADY BEEN IMPOSED, AND LOBBIED BRAZILIAN OFFICIALS AT THE HIGHEST LEVELS TO RESPOND TO U.S. CONCERNS. I HAVE INCLUDED SEVERAL LETTERS SENT TO ME WHICH ILLUSTRATE THIS FACT AND DEMONSTRATE THAT LEVERAGE IN NEGOTIATIONS CAN BE GENERATED IN A VARIETY OF WAYS.

THIS WAS NOT A DELIBERATE STRATEGY ON OUR PART, SINCE THE REASONS FOR THE DELAY IN ANNOUNCING SANCTIONS WERE RELATED TO THE PROGRESS WE WERE MAKING IN THE ONGOING NEGOTIATIONS WITH BRAZIL. HOWEVER, I NOTE THIS REACTION ONLY TO POINT OUT THAT SOMETIMES "RETALIATION" IS IN THE EYE OF THE BEHOLDER.

THANK YOU AGAIN FOR YOUR INTEREST. BRAZILIAN OFFICIALS WHO MET WITH YOU AND MEMBERS OF YOUR SUBCOMMITTEE DURING YOUR VISIT TO LATIN AMERICA LAST YEAR ARE WELL AWARE OF THE IMPORTANCE YOU PLACE ON INTELLECTUAL PROPERTY RIGHTS AND U.S. ACCESS TO THEIR MARKETS. SINCE WE ARE FIGHTING A RUGGED BATTLE WITH THE BRAZILIANS ON THIS AND OTHER TRADE ISSUES, THE ADMINISTRATION AND U.S. CONGRESS MUST WORK TOGETHER IF WE ARE TO CONTINUE MAKING PROGRESS. SINCERELY, CLAYTON YEUTTER, UNITED STATES TRADE REPRESENTATIVE. END TEXT.

3. BELOW ARE THE RESPONSES TO THE QUESTIONS RAISED IN THE SUBCOMMITTEE'S LETTER:

4. 301 INFORMATICS CASE (QUESTIONS 1 AND 4)

WHEN THE SECTION 301 CASE WAS FIRST INITIATED AGAINST BRAZIL, WE SOUGHT FROM THE BRAZILIAN GOVERNMENT (1) INCREASED INTELLECTUAL PROPERTY RIGHTS PROTECTION, (2) LIMITATIONS ON BRAZIL'S MARKET RESERVE FOR COMPUTER HARDWARE, (3) REFORMS IN BRAZIL'S ADMINISTRATION OF THE INFORMATICS LAW, AND (4) A MORE FLEXIBLE INTERPRETATION OF THE LAW'S INVESTMENT PROVISIONS TO ALLOW U.S. FIRMS

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TO FORM JOINT TECHNOLOGICAL VENTURES AND TO UPGRADE OR
MODERNIZE THEIR EXISTING OPERATIONS.

AFTER CONSIDERABLE PRESSURE, THE BRAZILIAN GOVERNMENT
RESPONDED TO SOME OF THESE OBJECTIVES:

O INTELLECTUAL PROPERTY RIGHTS

THE GOB AGREED AND PASSED INTO LAW IN DECEMBER 1987
LEGISLATION EXTENDING ADEQUATE COPYRIGHT PROTECTION FOR
COMPUTER SOFTWARE. THIS PART OF THE CASE REMAINS OPEN,
PENDING REVIEW OF THE IMPLEMENTING REGULATIONS.

O MARKET RESERVE

PRESIDENT SARNEY MADE A COMMITMENT THAT HIS ADMINISTRA-
TION WOULD NOT EXTEND THE MARKET RESERVE POLICY FOR
INFORMATICS BEYOND 1992, THE DATE THE RESERVE IS
SCHEDULED TO EXPIRE IN THE INFORMATICS LAW. HE ALSO
AGREED NOT TO EXTEND THE POLICY TO NEW SECTORS, SUCH AS
PHARMACEUTICALS. THE GOB ALSO PUBLISHED A LIST OF
COMPUTER AND ELECTRONICS PRODUCTS THAT WERE NOT SUBJECT
TO THE INFORMATICS RESERVE (THE "NEGATIVE LIST").
PRESIDENT REAGAN SUSPENDED THIS PART OF THE CASE IN
DECEMBER 1986 BUT DIRECTED USTR TO MONITOR THESE
COMMITMENTS. WHEN BRAZIL DENIED MARKET ACCESS TO A
U.S. SOFTWARE COMPANY IN SEPTEMBER 1987, THIS PART OF
THE CASE WAS REOPENED.

O ADMINISTRATIVE REFORMS

THE GOB DECENTRALIZED THE SECRETARIAT OF INFORMATICS
(SEI), THE AGENCY RESPONSIBLE FOR ADMINISTERING THE
INFORMATICS LAW AND AGREED TO MEET WITH U.S. OFFICIALS
REGULARLY TO REVIEW SPECIFIC U.S. COMPANIES' PROBLEMS.
CALLED THE AD HOC GROUP, IT HAS TO DATE DISCUSSED THE
PROBLEMS OF EIGHT U.S. FIRMS. CONIN, BRAZIL'S INTERAGENCY
COUNCIL ESTABLISHED TO REVIEW APPEALS OF SEI DECISIONS
AND TO ESTABLISH INFORMATICS POLICY, IS CURRENTLY
DEVELOPING NEW RULES TO SERVE MORE EFFECTIVELY AS AN
APPEALS MECHANISM. OF THE FOUR APPEALS PRESENTED TO
CONIN FOR A DECISION, CONIN HAS RULED IN WHOLE OR IN
PART AGAINST SEI IN THREE OF THE CASES. PRESIDENT
REAGAN SUSPENDED THIS PART OF THE CASE IN DECEMBER 1986.

O INVESTMENT

REPRESENTATIVES OF THE BRAZILIAN GOVERNMENT HAVE GIVEN
US VERBAL ASSURANCES THAT THEY WILL ATTEMPT TO BE
FLEXIBLE IN THE INVESTMENT AREA, BUT THEY CONTEND THAT
THERE HAVE NOT BEEN ENOUGH U.S. PROJECT SUBMISSIONS IN
RECENT MONTHS TO TEST THEIR COMMITMENT. WE CONTEND, OF
COURSE, THAT U.S. FIRMS ARE DISCOURAGED BY PAST EXPERIENCE
FROM MAKING SUCH SUBMISSIONS. THIS PART OF THE CASE
REMAINS OPEN AND IS AT AN IMPASSE UNTIL WE SEE SOME

MORE TEST CASES.

5. 301 INFORMATICS CASE, SOFTWARE LAW (QUESTIONS 2 AND
3)

IN JULY 1987, THE LOWER HOUSE OF THE BRAZILIAN LEGISLATURE
PASSED SOFTWARE LEGISLATION WHICH EXTENDED COPYRIGHT
PROTECTION TO COMPUTER SOFTWARE. PRESIDENT REAGAN
DELAYED SANCTIONS AS A RESULT, BUT DID NOT SUSPEND THIS
PART OF THE INVESTIGATION PENDING FINAL PASSAGE OF THE
BILL BY THE BRAZILIAN SENATE AND APPROVAL BY PRESIDENT
SARNEY.

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THE SOFTWARE LEGISLATION ALSO CONTAINED PROVISIONS RESTRICTING THE MARKETING OF FOREIGN SOFTWARE IN BRAZIL. HOWEVER, THE GOB AGREED THAT THE BILL'S IMPLEMENTING REGULATIONS WOULD BE DRAFTED ACCORDING TO OBJECTIVE, TECHNICAL CRITERIA WHICH WE HAD PRESENTED TO GOB OFFICIALS IN JUNE 1987. IF THE GOB WERE TO ADOPT THOSE CRITERIA, U.S. SOFTWARE COMPANIES WOULD BE ALLOWED REASONABLE ACCESS TO BRAZIL'S MARKET.

IN SEPTEMBER 1987, SEI REFUSED TO PERMIT A U.S. COMPANY TO LICENSE ITS OPERATING SYSTEM TO BRAZILIAN COMPANIES. SEI JUSTIFIED ITS DECISION BY CLAIMING THAT A BRAZILIAN FIRM MADE A "FUNCTIONAL EQUIVALENT" OR A SIMILAR OPERATING SYSTEM, ALTHOUGH WE WERE ABLE TO DEMONSTRATE THAT THE BRAZILIAN PRODUCT DID NOT OFFER THE SAME FUNCTIONS AS THE AMERICAN SYSTEM. THIS DECISION WAS CONTRARY TO OUR EARLIER AGREEMENT WITH THE GOB THAT A SIMILARS TEST WOULD BE BASED ON OBJECTIVE CRITERIA.

IN THE INTERIM, THE BRAZILIAN SENATE AMENDED THE SOFTWARE LEGISLATION TO INCLUDE AN IMPORT FEE OF UP TO 200 PERCENT ON IMPORTED SOFTWARE.

IN NOVEMBER 1987, PRESIDENT REAGAN REOPENED THE MARKET RESERVE PART OF THE 301 CASE AND ANNOUNCED HIS INTENTION TO IMPOSE 105 MILLION DOLLARS IN SANCTIONS AGAINST BRAZILIAN EXPORTS FOR DAMAGES TO THE U.S. SOFTWARE INDUSTRY. AFTER FURTHER NEGOTIATIONS IN JANUARY AND FEBRUARY 1988, THE GOB AGREED TO ADDRESS OUR CONCERNS. THE PROGRESS CITED IN THE USTR PRESS RELEASE REFERS TO THE FOLLOWING ACTIONS OR COMMITMENTS:

O PRESIDENT SARNEY USED HIS LINE-ITEM VETO AUTHORITY TO DELETE THE FINANCING MECHANISMS FOR THE FEE ON IMPORTED SOFTWARE.

O CONIN OVERTURNED SEI'S ORIGINAL DECISION TO DENY THE U.S. COMPANY THE RIGHT TO LICENSE ITS OPERATING SYSTEM. GOB OFFICIALS FURTHER AGREED THAT THE U.S. COMPANY COULD MARKET ITS PRODUCT IN BRAZIL. CONTRACT NEGOTIATIONS ARE STILL PENDING.

O SEI TURNED DOWN A BRAZILIAN FIRM'S MARKETING LICENSE APPLICATION FOR PIRATED APPLE MACINTOSH 512 COMPUTERS.

O THE GOB AGREED TO TAKE INTO ACCOUNT OUR INTERESTS REGARDING MARKET ACCESS FOR THE U.S. SOFTWARE INDUSTRY IN THE SOFTWARE LAW'S IMPLEMENTING REGULATIONS. ACCORDING TO THE LAW, THESE REGULATIONS MUST BE PROMULGATED NO LATER THAN APRIL 19.

THE ADMINISTRATION BELIEVES THAT IT WOULD HAVE BEEN COUNTERPRODUCTIVE TO HAVE IMPOSED RATHER THAN DELAYED SANCTIONS PENDING REVIEW OF THESE REGULATIONS. BY THE END OF FEBRUARY, BRAZILIAN EXPORTING INTERESTS WHO WERE SUPPORTIVE OF OUR POSITION HELD THE VIEW THAT THEIR GOVERNMENT HAD TAKEN POSITIVE STEPS TO ADDRESS U.S. CONCERNS. WHILE THESE STEPS WERE INSUFFICIENT TO SATISFY US, IT WAS OUR JUDGMENT THAT THE BRAZILIAN OFFICIALS WHO HAD PUSHED FOR REFORM WOULD BE BETTER ABLE TO RESPOND TO OUR CONCERNS IN THE IMPLEMENTING REGULATIONS IF WE POSTPONED SANCTIONS. RETALIATION COULD HAVE TRIGGERED A NATIONALISTIC BACKLASH THAT MIGHT HAVE LOST US THE BUSINESS COMMUNITY AND GENERAL PUBLIC SUPPORT WE'VE GENERATED IN BRAZIL. IT MIGHT ALSO HAVE JEOPARDIZED THE DECISIONS ALREADY MADE BY BRAZIL, WHICH WERE FAVORABLE TO THE U.S. SOFTWARE COMPANIES INVOLVED.

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WE EXPECT TO REVIEW THE IMPLEMENTING REGULATIONS BEFORE
THEY ARE PROMULGATED. IF THEY ARE NOT SATISFACTORY, I
WILL NOT HESITATE TO PROPOSE TO PRESIDENT REAGAN THAT
WE RETALIATE.
WHITEHEAD

END OF MESSAGE

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